Axelson, Inc., subsidiary of U. S. Industries, Inc. *and* Employees of Axelson, Inc., Petitioner and International Association of Machinists and Aerospace Workers, Local Lodge No. 1923. Case 16-RD-841

July 30, 1982

DECISION AND ORDER DENYING MOTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On August 15, 1980, the National Labor Relations Board issued a Decision and Direction in the above-entitled proceeding,[1] adopting the Hearing Officer's recommendation that Petitioner's Objection 2 to conduct affecting a decertification election held on September 21, 1979, be overruled. Thereafter, Petitioner filed, and the Board denied, a motion for reconsideration. Shortly after the Hearing Officer issued his report, Petitioner filed a charge alleging that the Employer's restriction of Petitioner's distribution of campaign literature on company property, which was the subject of Objection 2, violated Section 8(a)(1) of the Act. On March 21, 1980, while Petitioner's exceptions to the Hearing Officer's report were before the Board, a complaint issued in Case 16-CA-8956 on Petitioner's 8(a)(1) charge. That case was heard on August 28, 1980, before an Administrative Law Judge who issued his Decision on February 25, 1981, finding that the foregoing conduct violated Section 8(a)(1) of the Act. On August 4, 1981, the Board adopted the Administrative Law Judge's Decision[2] but modified his recommended Order. Petitioner, however, did not seek to have Case 16-CA-8956 consolidated or considered in connection with the instant proceeding until after the issuance of the Board's Decision and Order in Case 16-CA-8956, when it filed a new "Motion to Consolidate and/or for Reconsideration." It is that motion which is now before us.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Petitioner now contends that the records in the two cases should be considered together because such consideration "will facilitate a final, just resolution of the issues and possible relief to be accorded" here. This contention is extraordinary in light of Petitioner's previous silence. Petitioner also states that the relief accorded for the Employer's violation of Section 8(a)(1) "is wholly inadequate to remedy the harm done in this case." This contention, too, is extraordinary in light of Petitioner's previous stance, for not only did Petitioner fail in Case 16-CA-8956 to seek a more complete remedy, it also joined a motion before the Board to narrow the scope and effect of the Administrative Law Judge's recommended Order. Alternatively, Petitioner now asks the Board to reconsider for the second time its August 1980 decision in the instant proceeding in light of its August 1981 decision in Case 16-CA-8956.

We deny the motion for consolidation as untimely. The motion for reconsideration, however, requires further comment. It raises two issues, only one of which is timely. Petitioner argues that the two decisions are inconsistent with respect to findings of fact and to conclusions of law. The findings of fact in each case, of course, are based on the respective records made in each.[3] On the record in the instant proceeding, the Board found, and still finds, insufficient evidence of conduct that would warrant setting the election aside. To the extent Petitioner argues that the Board's factual findings in the instant proceeding are erroneous on the record then before it, regardless of the record in Case 16-CA-8956, its second motion for reconsideration is a year late.

The only timely basis for reconsideration is Petitioner's claim that the Board's finding that the Employer's restriction of Petitioner's campaigning violated Section 8(a)(1) and, therefore, invalidates, retroactively, its conclusion in the instant proceeding that the Employer's restriction did not warrant setting the election aside. This argument rests on Petitioner's interpretation of *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962). There, the Board set forth the general principle that "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election."[4] But the Board was attempting to avoid, not to establish, a "mechanical approach."[5] Thus, the Board stated further that it

[1] 251 NLRB 282.
[2] 257 NLRB 576.

[3] The Union, a vitally interested party in the instant proceeding, was not a party and did not have the opportunity to participate in Case 16-CA-8956. Thus, in no event could it be bound by the record made there. Further, there were no exceptions to the Administrative Law Judge's findings and conclusions in Case 16-CA-8956 with respect to the 8(a)(1) findings found there. In these circumstances, the Board's adoption of the Administrative Law Judge's ultimate findings and conclusions does not carry with it approval of each and every comment by the Administrative Law Judge on the evidence, but only of those that are essential to his ultimate findings. Petitioner, for example, would have us consider the Administrative Law Judge's gratuitous dictum that Petitioner's efforts to distribute literature to all employees "was doomed from the inception" (257 NLRB at 579.) Our Decision should not be taken as adopting the statement which, in any event, could not be made from a fair reading of the record in the instant proceeding.

[4] 137 NLRB at 1786.
[5] *Id.* at 1787.

would "look to the economic realities of the employer-employee relationship"[6] in determining whether an employer's conduct warranted setting aside an election.

Consistent with such a pragmatic approach, the Board has refused to set aside an election where, in a two-union election, one union won despite employer conduct that violated Section 8(a)(1) but was directed against both unions. *The Nestle Company*, 248 NLRB 732, 741 (1980). Cf. *The Swingline Company; Spotnails, Inc.*, 256 NLRB 704, 718 (1981). This was the approach taken in our published decision overruling Petitioner's Objection 2. We analogized the Employer's unlawful limitation on distributions by either Petitioner or the Union to the unlawful restriction of two competing unions. We forged a narrow ruling, the effect of which is that, if the Union has won the election despite the Employer's campaigning against it at the same time that it restricted employee campaigning, the election results are entitled to stand as against a mechanical insistence on the normal "laboratory conditions." Any other result would permit the Employer to benefit from its unlawful conduct and provide it with another opportunity to defeat the Union. *Nathan's Famous of Yonkers, Inc.*, 186 NLRB 131, 134 (1970); *Packerland Packing Company, Inc.*, 185 NLRB 653, 654 (1970). The fact that the Employer's interference with the employees' right to distribute literature later was found to violate Section 8(a)(1), a finding that should have taken no one by surprise, does not cast the issue into any light significantly different from that in which we examined it in the first place.

[6] *Id.*

ORDER

It is hereby ordered that the Petitioner's motion to consolidate and/or for reconsideration be, and it hereby is, denied in its entirety.